DUNGGON JAYA SDN BHD v. AEROPOD SDN BHD & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ABDUL RAHMAN SEBLI JCA
KAMARDIN HASHIM JCA
KAMALUDIN MD SAID JCA
[CIVIL APPEALS NO: S-02(NCVC)(A)-1146-06-2017
& S02(IM)(NCVC)-1147-06-2017]
17 MAY 2019

CIVIL PROCEDURE: *Injunction – Application for – Application to restrain first respondent from calling on bank guarantee – Unconscionability – Whether first respondent acted unconscionably in calling on bank guarantee – Whether vitiated validity of demand – Whether demand for bank guarantee premature, invalid and of no effect – Whether balance of convenience favoured grant of injunction – Whether damages an adequate remedy – Whether appellant prevented from filing application for injunction*

CONTRACT: *Guarantee – Bank guarantee – Unconscionability – Injunction – Application for – Application to restrain first respondent from calling on bank guarantee – Whether first respondent acted unconscionably in calling on bank guarantee – Whether vitiated validity of demand – Whether demand for bank guarantee premature, invalid and of no effect – Whether balance of convenience favoured grant of injunction – Whether damages an adequate remedy – Whether appellant prevented from filing application for injunction*

The first respondent and the appellant entered into a formal contract in which the appellant was to carry out construction works. The parties entered into a bank guarantee for the sum of RM4,031,979.34 issued by the second respondent bank. On 12 October 2015, the first respondent unilaterally terminated the contract on the ground that the appellant failed to proceed regularly and diligently with the construction works, even though the appellant was given until February 2016 to complete the works. The bank guarantee was called on by the first respondent. The appellant thus filed a writ of summons for an order that the first respondent be restrained from calling on the bank guarantee and applied for an *ex parte* injunction. The first respondent countered by filing an application to stay all proceedings under s. 10 of the Arbitration Act 2005 ('the Arbitration Act') pending arbitration. The High Court granted the injunction application and the first respondent appealed. The court then allowed the first respondent's appeal and set aside the injunction on the principal ground that the appellant in its injunction application failed to cite s. 11 of the Arbitration Act as its intitulement and also failed to go by the originating summons procedure. The appellant was,

however, given the liberty to re-file the injunction application by the originating summons procedure. The applicant thus re-filed the injunction application by the proper mode. The High Court granted the *ex parte* injunction which was extended as an *ad interim* injunction until it was disallowed. Hence, these appeals. The main thrust of the appellant's argument was that the first respondent had acted unconscionably in calling on the bank guarantee and that under the express terms of the bank guarantee, the bank guarantee could only be released by the second respondent after the adjudication had decided that the appellant was in breach of the contract. The appellant also raised the issue that the trial judge was wrong in admitting the first respondent's affidavit-in-reply as it was bad in law, an abuse of the court process and inadmissible for the purpose of the hearing of the appellant's application as it was never affirmed or filed in relation to the originating summons in the present case. The first respondent's argument, on the other hand, was that the bank guarantee was unconditional and unqualified. The first respondent further argued that the allegations of unconscionable conduct by the appellant were unfounded and nothing more than unproven allegations of contractual breaches *simpliciter* in respect of which the appellant may seek damages *via* the upcoming arbitration between the parties. The respondent also raised the issue of *res judicata*, submitting that the appellant's interim relief application had previously been ventilated under the same order and an interim injunction with modifications was obtained from the High Court. According to the first respondent, the present application by the appellant was an abuse of the court process.

Held (allowing appeal with costs)

Per Abdul Rahman Sebli JCA delivering the judgment of the court:

(1) Although the bank guarantee was an unconditional and an on demand performance bond, the first respondent was guilty of unconscionable conduct, which vitiated the validity of the demand. It was clear that the first respondent had engineered a situation to unfairly avoid making payment of sums due and owing to the appellant by, *inter alia*, not paying the appellant for the additional works and costs incurred and by complicating and constricting the appellant's cash flow. All these taken cumulatively amounted to conduct of such a degree as to prick the conscience of a reasonable and sensible man, in particular, the first respondent's act of giving an extension of time up to 15 February 2016, yet it terminated the contract four months earlier on 12 October 2015. The trial judge had exercised its discretion wrongly in refusing to grant the injunction sought. (paras 25-27)

(2) The facts and circumstances surrounding the demand made by the first respondent on the bank guarantee were so lacking in good faith that taken as a whole they amounted to unconscionable conduct warranting the court's intervention by way of injunction to avoid injustice. There was a strong element of unfairness on the part of the first respondent in calling on the bank guarantee. Thus, the demand for the bank guarantee was premature, invalid and of no effect. A strong *prima facie* case of unconscionability had been made out against the first respondent. (paras 29 & 30)

(3) In the affidavits filed by the first respondent, it did not deny or explain away the additional works carried out by the appellant, the delay in certification, the delay and/or failure to make full payment to the appellant, and being in possession of the RM3,798,100.59 as retention sum. In light of the above facts, the first respondent ought to be restrained from calling on or receiving the bank guarantee before any adjudication or decision was made in the arbitration proceedings on the question whether the termination of the contract was wrongful or otherwise. The balance of convenience therefore favoured the grant of an injunction. (paras 32-34)

(4) The first respondent would not be prejudiced by the grant of the injunction because the monies were safe with the second respondent bank and the first respondent was already withholding a large sum of money *ie* more than RM4 million due to the appellant. Damages would not be an adequate remedy as the appellant, having been starved of the fund, would be crippled if the bank guarantee was released and the second respondent were to, as in all probability it would, run after the appellant for the payment of the RM4 million bank guarantee. (paras 34 & 35)

(5) Separate applications require separate affidavits in opposition or in reply. The trial judge was therefore wrong in failing to uphold the appellant's preliminary objection to the admission of the first respondent's affidavit. By not filing any affidavit in opposition to the appellant's originating summons, it must be taken that the first respondent did not wish to contradict any of the averments made by the appellant in its affidavit in support. (para 44)

(6) The appellant should not be prevented from filing the present application for injunction as the re-filing of the application was on the authority of this court's order *ie* that the appellant be given the liberty to re-file. The first respondent did not appeal against the decision, which meant that it accepted the decision as final. It could not now raise *res judicata* as an issue. Hence, the decision of the High Court was set aside. (para 46)

Bahasa Malaysia *Headnotes*

Responden pertama dan perayu memeterai satu perjanjian rasmi untuk perayu menjalankan kerja-kerja pembinaan. Pihak-pihak memasuki satu jaminan bank untuk jumlah RM4,031,979.34 yang dikeluarkan oleh responden kedua bank. Pada 12 Oktober 2015, responden pertama secara unilateral membatalkan kontrak atas alasan perayu gagal meneruskan kerja-kerja pembinaan dengan teratur dan tekun, walaupun perayu diberikan hingga Februari 2016 untuk menyiapkan kerja-kerja itu. Responden pertama membuat panggilan ke atas jaminan bank. Perayu, oleh itu, memfailkan writ saman untuk perintah responden pertama dihalang daripada memanggil jaminan bank dan memohon injunksi *ex parte*. Responden pertama bertindak balas dengan memfailkan permohonan untuk menggantungkan segala prosiding bawah s. 10 Akta Timbang Tara 2005 ('Akta Timbang Tara') sementara menunggu timbang tara. Mahkamah Tinggi membenarkan permohonan injunksi dan responden pertama merayu. Mahkamah kemudiannya membenarkan rayuan responden pertama dan mengetepikan injunksi atas alasan utama bahawa perayu dalam permohonan injunksinya gagal menyatakan s. 11 Akta Timbang Tara sebagai tajuknya dan juga gagal menggunakan prosedur saman pemula. Perayu, walau bagaimanapun, diberikan kebebasan untuk memfailkan semula permohonan injunksi dengan prosedur saman pemula. Pemohon oleh itu memfailkan semula permohonan injunksi melalui mod yang sesuai. Mahkamah Tinggi membenarkan injunksi *ex parte* yang telah dilanjutkan sebagai injunksi *ad interim* sehingga ia tidak dibenarkan. Oleh itu, rayuan-rayuan ini. Hujah utama hujahan perayu adalah responden pertama telah bertindak dengan cara tidak berpatutan apabila memanggil jaminan bank dan bawah terma-terma nyata jaminan bank, jaminan bank hanya boleh dilepaskan oleh responden kedua selepas adjudikasi memutuskan bahawa perayu telah melanggar kontrak. Perayu juga membangkitkan isu hakim bicara terkhilaf apabila menerima pakai afidavit jawapan responden pertama kerana itu salah dari segi undang-undang, satu penyalahgunaan proses dan tidak diterima pakai untuk tujuan perbicaraan permohonan perayu kerana tidak disahkan atau difailkan berkaitan saman pemula dalam kes ini. Hujahan responden pertama, walau bagaimanapun, adalah jaminan bank tidak bersyarat. Responden pertama menghujahkan lagi bahawa dakwaan tingkah laku tidak berpatutan oleh perayu tidak berasas dan adalah dakwaan-dakwaan yang tidak dibuktikan berkenaan pelanggaran kontrak, yang perayu boleh menuntut ganti rugi melalui timbang tara yang akan datang antara pihak-pihak. Responden juga membangkitkan isu *res judicata*, menghujahkan bahawa permohonan relief interim perayu telah pun ditangani bawah perintah yang sama dan satu injunksi interim dengan pindaan telah diperolehi dari Mahkamah Tinggi. Menurut responden pertama, permohonan perayu ini adalah satu penyalahgunaan proses mahkamah.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

(1) Walaupun jaminan bank tidak bersyarat dan satu bon pelaksanaan yang dipinta, responden pertama bersalah atas kelakuan yang tidak berpatutan, yang membatalkan kesahihan permintaan. Jelas sekali bahawa responden pertama telah mewujudkan situasi untuk secara tidak adil mengelak daripada membuat bayaran jumlah yang tertunggak dan masih terhutang kepada perayu melalui, antara lain, tidak membayar perayu untuk kerja-kerja tambahan dan kos-kos yang terpaksa ditanggung dan dengan merumitkan dan menjerut aliran wang perayu. Kesemua ini, dipertimbangkan secara kumulatif, berjumlah pada kelakuan yang mencucuk hati nurani seseorang yang munasabah dan berakal, khususnya, tindakan responden pertama memberikan lanjutan masa sehingga 15 Februari 2016, tetapi telah membatalkan kontrak empat bulan sebelumnya iaitu pada 12 Oktober 2015. Hakim bicara telah melaksanakan budi bicaranya dengan salah apabila enggan membenarkan injunksi yang dituntut.

(2) Fakta-fakta dan keadaan yang meliputi permintaan yang dibuat oleh responden pertama berkenaan jaminan bank tidak mempunyai niat baik dan diambil secara keseluruhan ini membentuk kelakuan yang tidak berpatutan mewajarkan campur tangan mahkamah melalui injunksi untuk mengelak ketidakadilan. Terdapat elemen ketidakadilan oleh pihak responden pertama dalam memanggil jaminan bank. Oleh itu, panggilan untuk jaminan bank adalah pramatang, tidak sah dan tidak membawa kesan. Satu kes *prima facie* kukuh kelakuan tidak teratur telah dibuat terhadap responden pertama.

(3) Afidavit-afidavit yang telah difailkan oleh responden pertama tidak menafikan atau menjelaskan kerja-kerja tambahan yang dijalankan oleh perayu, kelewatan sijil, kelewatan dan/atau kegagalan membuat bayaran penuh kepada perayu, dan juga memiliki RM3,798,100.59 sebagai wang tahanan. Berikutan fakta-fakta ini, responden pertama mesti dihalang daripada memanggil atau menerima jaminan bank sebelum apa-apa adjudikasi atau keputusan dibuat dalam prosiding timbang tara atas persoalan sama ada pembatalan kontrak adalah salah atau sebaliknya. Imbangan kebarangkalian, oleh itu, memihak pada injunksi dibenarkan.

(4) Responden pertama tidak akan diprejudiskan oleh kebenaran injunksi kerana wang-wang adalah selamat dengan bank responden kedua dan responden pertama pun sudah memegang jumlah yang besar iaitu lebih daripada RM4 juta yang terhutang pada perayu. Ganti rugi bukan remedi yang sesuai kerana perayu, setelah kebuluran dana, akan lumpuh jika jaminan bank dilepaskan dan responden kedua mengejar perayu untuk bayaran jaminan bank RM4 juta.

(5) Permohonan berlainan memerlukan afidavit bertentangan dan afidavit balasan yang berlainan. Hakim bicara terkhilaf apabila gagal mempertahankan bantahan awalan perayu terhadap penerimaan masuk afidavit responden pertama. Dengan tidak memfailkan mana-mana afidavit bertentangan terhadap saman pemula perayu, ini menunjukkan responden pertama tidak ingin menyangkal mana-mana pendapat yang dibuat oleh perayu dalam afidavit sokongannya.

(6) Perayu tidak sepatutnya dihalang daripada memfailkan permohonan ini kerana pemfailan semula permohonan adalah atas kuasa perintah mahkamah ini iaitu perayu diberikan kebebasan untuk memfailkan semula. Responden pertama tidak merayu terhadap keputusan, dan ini bermaksud keputusan itu diterima sebagai muktamad. Responden pertama tidak boleh sekarang membangkitkan *res judicata* sebagai isu. Oleh itu, keputusan Mahkamah Tinggi diketepikan.

Case(s) referred to:

Bumi Armada Navigation Sdn Bhd v. Mirza Marine Sdn Bhd [2015] 5 CLJ 652 HC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kindenko Sdn Bhd & Anor [2009] 2 CLJ 1 FC ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

Kejuruteraan Bintai Kidenko Sdn Bhd v. Nam Fatt Construction Sdn Bhd & Anor [2011] 7 CLJ 442 CA ***(refd)***

Merita Merchant Bank Singapore Ltd v. Dewan Bahasa dan Pustaka [2014] 9 CLJ 1064 FC ***(refd)***

Samar Mansor v. Mustafa Kamarul Ariffin [1974] 1 LNS 147 FC ***(refd)***

Sumatec Engineering and Construction Sdn Bhd v. Malaysian Refining Co Sdn Bhd [2012] 3 CLJ 401 FC ***(refd)***

Z Ltd v. A & Ors [1982] 1 All ER 556 ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 10, 11

Rules of Court 2012, O. 28 r. 3C, O. 29

For the appellant - Rakhbir Singh; M/s Rakhbir Singh & Co

For the 1st respondent - Lau Cheung Hoon; M/s Jayasuriya Kah & Co

[Editor's note: For the High Court judgment, please see Dunggon Jaya Sdn Bhd v. Aeropod Sdn Bhd & Anor [2017] 1 LNS 1401 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli JCA:

[1] These two appeals arose from the decision of the High Court at Kota Kinabalu which:

(a) disallowed the appellant's application by way of originating summons to restrain the first respondent from calling on the bank guarantee of RM4,031,979.34 issued by the second respondent until the appellant's claim is heard and disposed of by arbitration;

(b) disallowed the appellant's preliminary objection against the use of the first respondent's affidavit in reply as an opposing affidavit in the said application; and

(c) allowing the first respondent's notice of application to set aside the *ex parte* originating order dated 20 January 2017 granted to the appellant.

[2] Having heard arguments by both sides, we allowed the appellant's appeals and these are our grounds.

[3] The following facts are not in dispute. The appellant was appointed by the first respondent to carry out construction works for the Main Building Works for Package 1: Basement Level, Level 1, 2, Block C and D pursuant to a Letter of Acceptance dated 29 November 2013 under Contract Reference No. ASAB-BLDG-C029-13.

[4] On or about 4 February 2014, the appellant and the first respondent entered into a formal contract adopting the PAM Form of Contract 2006 (Without Quantities) with modifications.

[5] On 19 November 2014, the parties entered into a Bank Guarantee No. BGINM001592 for the sum of RM4,031,979.34. The bank guarantee is couched in the following language:

> If the Contractor shall in any respect fail to execute the Contract or commit any breach of his obligations thereunder then the Guarantor shall within Seven (7) banking days upon receipt of written demand pay to the Principal up to and not exceeding the sum of Ringgit Malaysia Four Million Thirty One Thousand Nine Hundred Seventy Nine and Sen Thirty Four only (RM4,031,979.34) representing 5% of the Contract Value notwithstanding any contestation or protest by the Contractor or by the Guarantor or by any other third party.

[6] On 12 October 2015, the first respondent unilaterally terminated the contract on the ground that the appellant failed to proceed regularly and diligently with the construction works even though the appellant was given until February 2016 to complete the works. The bank guarantee was called on by first respondent on the same day.

[7] On 21 October 2015, the appellant filed a writ of summons for an order that the first respondent be restrained from calling on the bank guarantee, and on even date applied for an *ex parte* injunction. The first respondent countered by filing an application to stay all proceedings under s. 10 of the Arbitration Act 2005 ("the Arbitration Act") pending arbitration.

[8] On 22 October 2015 the *ex parte* injunction applied for by the appellant was granted by the High Court.

[9] On 22 February 2016 the court granted a stay of proceedings under s. 10 of the Arbitration Act of the remaining proceedings under the first suit but not the injunction application.

[10] On 25 May 2016, the *inter parte* injunction application was heard and granted by Ravinthran N Paramaguru J. The first respondent appealed against the decision.

[11] On 19 January 2017, this court allowed the first respondent's appeal and set aside the injunction on the principal ground that the appellant in its injunction application failed to cite s. 11 of the Arbitration Act in its intitulement and also failed to go by the originating summons procedure. This court however gave the appellant the liberty to re-file the injunction application by the originating summons procedure.

[12] The following day, ie, on 20 January 2017, the appellant re-filed the injunction application by the proper mode and citing s. 11 of the Arbitration Act in its intitulement. The High Court granted the *ex parte* injunction on the same date which was extended as an *ad interim* injunction until 12 May 2017 when the said application was disallowed. The court however granted an *Erinford* injunction in favour of the appellant pending disposal of the present appeal.

[13] The appellant's cause of action against the first respondent was for:

(i) breach of the PAM 2006 construction contract agreement;

(ii) wrongful termination of the contract; and

(iii) to restrain the first respondent from calling on the bank guarantee on the ground of unconscionability.

[14] As against the second respondent bank, the appellant's cause of action was premised on a separate contract in the bank guarantee itself between the appellant and the second respondent. The contract was not under the Arbitration Act and the second respondent was not a party to the arbitration proceedings between the appellant and the first respondent.

[15] It was pointed out that the second respondent did not contest the appellant's application for injunction and had indicated to the court that it would abide by any order granted by the court. The second respondent was not represented by counsel at the hearing of these appeals.

[16] The main thrust of the appellant's argument was that the first respondent had acted unconscionably in calling on the bank guarantee and that under the express terms of the bank guarantee, the bank guarantee could only be released by the second respondent bank after the adjudication had decided that the appellant was in breach of the contract.

[17] The first respondent's argument on the other hand was that the bank guarantee is unconditional and unqualified, citing *Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kindenko Sdn Bhd & Anor* [2009] 2 CLJ 1; [2008] 6 MLJ 636 where the Federal Court held:

> [13] The clause 'notwithstanding any contestation or protest by the contractor' in the third question shows clearly that payments would only be made by the bank once a valid letter of demand is received and it is irrelevant whether there is any protest or contestation. The contractor's remedy is to sue in damages. The implication of such clause is that payment must be made upon receipt of a valid demand. This principle can be seen in the case of *Kerajaan Malaysia v. South East Asia Insurance Bhd* [2000] 5 MLJ 265 where it was held that:
>
> > Paragraph 1 is so drafted that the guarantor shall become liable merely when the demand is made by the government notwithstanding any contestation or protest by the contractor or by the guarantor or by any third party … Likewise, in the present case, the words 'notwithstanding any contestation or protest by the contractor or by ourselves or by any third party' in para 1 above, do not alter the fact that the money is payable on a written demand under and pursuant to the said insurance guarantee. Therefore, on its true construction this insurance guarantee is an on demand performance bond.

[18] Reliance was also placed on another Federal Court case, *Sumatec Engineering and Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd* [2012] 3 CLJ 401; [2012] 4 MLJ 1 which held that a bank guarantee is separate and independent of the underlying contract between the disputing parties and the contract between the account party and the bank.

[19] The sole question of law for the Federal Court's determination in that case was:

> Whether 'unconscionable conduct' on the part of a beneficiary of a bank guarantee or a performance bond is a distinct ground, apart from 'fraud', that entitles the Court to restrain the beneficiary from calling on or demanding and receiving monies under the bank guarantee or performance bond.

[20] Whether unconscionability applies in a particular case would depend largely on the material facts. The following propositions by the Court of Appeal (from which the Federal Court case emanated) were endorsed by *Sumatec*:

> As in the case of fraud, to establish "unconscionability" there must be placed before the court manifest or strong evidence of some degree in respect of the alleged unconscionable conduct complained of, not a bare assertion. Hence, the Respondent has to satisfy the threshold of a seriously arguable case that the only realistic inference is the existence of "unconscionability" which would basically mean establishing a strong *prima facie* case. In other words, the Respondent has to place sufficient evidence before the court so as to enable the court to be satisfied, not necessarily beyond reasonable doubt, that a case of "unconscionability" being committed by the beneficiary (the Appellant) has been established to an extent sufficient for the court to be minded to order injunction sought. This additional ground of "unconscionability" should only be allowed with circumspect where events or conduct are of such a degree such as to prick the conscience of a reasonable and sensible man.

[21] The Federal Court also cited with approval another decision of this court in *Kejuruteraan Bintai Kidenko Sdn Bhd v. Nam Fatt Construction Sdn Bhd & Anor* [2011] 7 CLJ 442 and went on to say:

> We also agree with these other holdings of the Court of Appeal:
>
> (i) In my view, consonant with the principle as laid down by my learned brother, unconscionability is a doctrine which allows courts to deny enforcement of a contract because of abuses arising out of the contract.
>
> (ii) In my view the principle underlying the unconscionability doctrine is the prevention of oppression and unfair conduct; and because the determination of unconscionability is fact specific, courts must consider such a claim on a case by case basis and assess the totality of the circumstances.
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> (iii) A distinction must be drawn between an injunction to restrain a bank/issuer from making payment out on a performance bond (which is governed by the performance guarantee agreement) and an injunction to restrain a beneficiary from making a demand on the bond (which is governed by the underlying contract between the parties).
>
> (iv) All the facts and circumstances surrounding the demands made by the first respondent on both the performance bonds were so lacking in good faith and amounted to unconscionable conduct that it warranted court intervention by way of injunction to avoid injustice. The demands on the bonds were premature, invalid and of no effect.

[22] It was the first respondent's contention that the learned High Court Judge did not commit any error of law in dissolving the *ex parte* interim injunction and to set aside the *ex parte* originating summons as the appellant failed to prove that the first respondent acted unconscionably in calling on the bank guarantee.

[23] It was argued that the learned judge's finding that the first respondent had not acted unconscionably is not plainly wrong and should not therefore be disturbed, citing *Gan Yook Chin v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; *Merita Merchant Bank Singapore Ltd v. Dewan Bahasa dan Pustaka* [2014] 9 CLJ 1064; *Samar Mansor v. Mustafa Kamarul Ariffin* [1974] 1 LNS 147; [1974] 2 MLJ 71.

[24] It was further argued that the allegations of unconscionable conduct by the appellant were unfounded and nothing more than unproven allegations of contractual breaches *simpliciter* in respect of which the appellant may seek for damages *via* the upcoming arbitration between the appellant and the first respondent and does not warrant an injunction to restrain the first respondent from calling on the bank guarantee.

[25] Having regard to the principles and the totality of the circumstances, we were inclined to agree with the appellant that the learned judge had exercised his discretion wrongly in refusing to grant the injunction sought. Although the bank guarantee was an unconditional and an on demand performance bond, the first respondent was guilty of unconscionable conduct, which vitiates the validity of the demand.

[26] On the facts, it is clear that the first respondent had engineered a situation to unfairly avoid making payment of sums due and owing to the appellant:

(i) by not certifying and/or not paying and/or delaying payment to the appellant for the additional works and costs incurred;

(ii) by wrongfully deducting the contract sums due to the appellant under the interim certificate thereby complicating and constricting the appellant's cash flow for the purpose of paying the sub-contractors, workers and suppliers working on site;

(iii) by its under certification as evidenced by the appellant's letter to Archicentre Sdn Bhd;

(iv) the first respondent and/or its consultants in breach of cls. 21.3 and 30.6 of the contract failed to issue to the appellant a certificate for the release of 2.5% retention sum from the sum of RM10.4 million in respect of works under section 1, which the first respondent to date has not paid and released to the appellant;

(v) as at the date of the termination, the first respondent retained and controlled the sum of RM3,798,100.59 as retention sum under the contract;

(vi) delayed in certifying progress claim no. 22 amounting to RM3,387,520.45 and under certifying it as only RM1,779,850.66. Even this under certified sum of RM1,779,850.66 has not been paid to the appellant;

(vii) the first respondent was quick to starve the appellant of funds to pay its workers by getting its consultant to certify RM1.5 million LAD and deducting the same from interim payment certificates no. 17 and no. 20 due to the appellant;

(viii) terminating the contract when the delay alleged was a meagre 3.9% to 5% when the appellant still had five more months to complete the works;

(ix) the respondent gave an extension of time to the appellant to 15 February 2016, yet it terminated the contract one year earlier on 12 October 2015.

(x) the notice of termination dated 12 October 2015 was made in bad faith as it was premised on Archicentre's letters dated 17 September 2015, 19 September 2015, 23 September 2015, 29 September 2015 and 5 October 2015 which were not issued and served in strict compliance with terms of the contract. The proper entity to have issued any such letters ought to be the project architect ie, Haoyun Architect and not Archicentre Sdn Bhd.

[27] All these taken cumulatively amounts to conduct of such a degree as to prick the conscience of a reasonable and sensible man, in particular the first respondent's act of giving an extension of time up to 15 February 2016, yet it terminated the contract four months earlier on 12 October 2015.

[28] It was untenable in our view for learned counsel to argue that any difficulty faced by the appellant on site was compensated with ample extension of time and that it had been mutually acknowledged and accepted by both parties that the extension of time granted would have no impact on costs, loss and expenses.

[29] In our view, the facts and circumstances surrounding the demand made by the first respondent on the bank guarantee were so lacking in good faith that taken as a whole they amounted to unconscionable conduct warranting the court's intervention by way of injunction to avoid injustice.

[30] There is in our view a strong element of unfairness on the part of the first respondent in calling on the bank guarantee. On the face of it, the demand for the bank guarantee was premature, invalid and of no effect. Thus, a strong *prima facie* case of unconscionability had been made out against the first respondent.

[31] It is true, as contended by learned counsel for the first respondent, that these are unproven allegations by the appellant, but the test is not whether they are proven or otherwise but whether sufficient evidence had been placed before the court so as to enable the court to be satisfied, not necessarily beyond reasonable doubt, that a case of unconscionability had been established to an extent that is sufficient for the court to be minded to order the injunction sought: *Sumatec (supra)*.

[32] It is pertinent to note that in the affidavits filed by the first respondent, it did not deny or explain away the additional works carried out by the appellant, the delay in certification, the delay and/or failure to make full payment to the appellant, and being in possession of the RM3,798,100.59 as retention sum.

[33] We accepted the appellant's argument that in the light of the above facts, the first respondent ought to be restrained from calling on or receiving the bank guarantee before any adjudication or decision is made in the arbitration proceedings on the question whether the termination of the contract was wrongful or otherwise.

[34] We were of the further view that the balance of convenience favours the grant of an injunction. The first respondent will not be prejudiced because the monies are safe with the second respondent's bank and the first respondent is already withholding a large sum of money, ie, more than RM4 million due to the appellant.

[35] We did not think damages would be adequate remedy as the appellant, having been starved of fund, would be crippled if the bank guarantee is released and the second respondent bank were to, as in all probability it would, run after the appellant for payment of the RM4 million bank guarantee.

[36] That disposes of the appeal but for completeness, we shall deal with the other issues raised by learned counsel for the appellant. First, the learned judge's failure to direct his mind to *Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 193. In that case, Gopal Sri Ram JCA (as he then was) in his supporting judgment set out the steps that a judge should take in an application of this nature, in the following terms:

To summarise, a Judge hearing an application for interlocutory injunction should undertake an inquiry along the following lines:

first, he must ask himself whether the totality of the facts presented before him discloses a *bona fide* serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of Counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;

second, having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, *inter alia*, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the Judge would be entitled to dispense with the usual undertaking as to damages (see: *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn. Bhd.* [1988] 1 CLJ (Rep) 435; [1988] 3 MLJ 90). Apart from such cases, the Judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee; and

thirdly, the Judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the *status quo*, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] AC 130 and applied in *Cheng Hang Guan (supra)*. It is a judicial discretion capable of correction on appeal. Accordingly, the Judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would

satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A Judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

[37] Nowhere in his grounds of judgment did the learned judge refer to *Keet Gerald*, nor does the grounds indicate that he was mindful of the steps that he was required to take, along the lines set out by this court in that case.

[38] Importantly, he does not appear to have considered whether on the totality of the facts presented before him, a *bona fide* serious issue to be tried had been disclosed. The failure by the learned judge to direct his mind to *Keet Gerald* or to the principles laid down in that case is to our mind a serious misdirection by way of non-direction, warranting intervention by this court.

[39] Additionally, the appellant raised the issue that the learned judge was wrong in admitting the first respondent's affidavit in reply affirmed by Chan Tah Seong despite objection by the appellant. The first respondent in the affidavit in reply had deposed as follows:

3. I am advised by the solicitors for the 1st Respondent and hereby state that I am filing this Affidavit in Reply to the Affidavit in Support affirmed by ELVIS MAIDIN EBRAHIM on 20.1.2017 …

4. I affirm this Affidavit in Support of the 1st Respondent's Notice of Application to set aside the *ex parte* Order obtained in the Present Application.

[40] Order 28 r. 3C of the Rules of Court 2012 provides as follows:

Supporting affidavits (O. 28, r. 3C)

3C(1) Unless otherwise provided in any written law, where the plaintiff intends to adduce evidence in support of an originating summons, he shall do so by affidavit and shall file the affidavit or affidavits and serve a copy thereof on every defendant not later than seven days after the service of the originating summons.

(2) Unless otherwise provided in any written law, in the case of an *ex parte* originating summons, the Appellant shall file a supporting affidavit or affidavits at the time of filing the originating summons.

(3) Where the defendant intends to adduce evidence with reference to the originating summons served on him, *he shall do so by affidavit and the affidavit or affidavits shall be filed and a copy thereof shall be served on the plaintiff not later than twenty-one days after being served with a copy of the affidavit or affidavits by the plaintiff under paragraph (1).*

A (4) Unless otherwise directed by the Court, a party intending to reply to an affidavit served on him shall file his affidavit and serve it on the other party within fourteen days from the date the affidavit he intends to reply was served on him. (emphasis added)

[41] It was submitted that the affidavit filed by the first respondent is bad B in law, an abuse of the court process and inadmissible for the purpose of the hearing of the appellant's application as it was never affirmed or filed in relation to the originating summons in the present case. The basis for the argument was as follows:

(a) the filing fee for the said affidavit was only paid in relation to the C application for the affidavit filed for the first respondent's notice of application to strike out the appellant's *ex parte* interim injunction;

(b) the said affidavit filed for the first respondent's notice of application to strike out the appellant's *ex parte* originating summons was re-used to oppose the appellant's *inter partes* injunction application; and D

(c) there was no separate affidavit filed for the *inter partes* injunction hearing.

[42] The first respondent's answer to the appellant's contention was that the issues and facts for both applications were the same and there was only one outcome and thus the learned judge was correct to find that the appellant E would not be prejudiced by the use of the same affidavit that was used in the other application.

[43] It was submitted that the two proceedings were intertwined and the outcome of the first respondent's notice of application would directly reflect the outcome of the appellant's *ex parte* originating summons. It was further F submitted that if the first respondent's notice of application was allowed, it would follow that the *ex parte* interim injunction would be set aside and similarly if the first respondent was successful in the *inter partes* hearing, it would follow that the *ex parte* interim injunction would also be set aside.

G **[44]** We were inclined to agree with the appellant. Separate applications require separate affidavits in opposition or in reply. The learned judge was therefore wrong in failing to uphold the appellant's preliminary objection to the admission of the first respondent's affidavit. By not filing any affidavit in opposition to the appellant's originating summons, it must be taken that the first respondent did not wish to contradict any of the averments made by H the appellant in its affidavit in support

[45] The first respondent on its part had raised the issues of *res judicata* and s. 11 of the Arbitration Act 2005 ("the Arbitration Act"). First, the issue of *res judicata*. The complaint was that the appellant's interim relief application had previously been ventilated under the same order, ie, O. 29 of the Rules I

of Court 2012 and an interim injunction with modifications was obtained from the High Court on 25 May 2016. According to the first respondent, the present application by the appellant was an abuse of the court process.

[46] We found no substance to the argument. The appellant should not be prevented from filing the present application for injunction as the re-filing of the application was on the authority of this court's order, ie, that the appellant be given the liberty to re-file. In any event, the first respondent did not appeal against the decision, which means it accepted the decision as final. It could not now raise *res judicata* as an issue.

[47] With regard to s. 11 of the Arbitration Act, the first respondent relied on *Bumi Armada Navigation Sdn Bhd v. Mirza Marine Sdn Bhd* [2015] 5 CLJ 652 to support its argument that the injunction application ought not be allowed. In that case, the High Court set out five conditions to warrant the grant of an interim relief pending disposal of the arbitration proceedings. Reliance was placed on headnote (2) of the report as follows:

> (2) Section 11(1) AA expressly allows judicial 'intervention' in a very limited form – the court may grant interim (and not permanent) relief pending the disposal of arbitration. An applicant for interim relief under s. 11(1) AA before the commencement of any arbitral proceedings, should satisfy the court of the five following matters: (a) the applicant must have a cause of action against the party whom interim relief is sought; (b) there must be an 'arbitration agreement' as understood in ss. 2(1) and 9(1) to (5) AA; (c) the relief sought must be interim in nature and cannot be permanent in effect; (d) the interim relief must support, assist, aid and/or facilitate the proposed arbitral proceedings; (e) arbitral proceedings should be commenced within a reasonable time.

[48] It was submitted that the appellant failed to show how the injunction it had sought (ie, to restrain the first respondent from calling on the bank guarantee) could support, assist, aid and/or facilitate the pending arbitral proceedings between the appellant and the first respondent.

[49] Learned counsel stressed the point that regardless of whether the amount retained by the bank guarantee remains in the possession of the second respondent or otherwise, the appellant can still proceed with the arbitration and in the event the arbitrator decides against the first respondent, the sum of the bank guarantee would be reinstated to the appellant. As such, there is no real threat of the bank guarantee being dissipated: *Z Ltd v. A & Ors* [1982] 1 All ER 556.

A **[50]** With due respect to learned counsel, we found no merit in the argument. Once a strong *prima facie* case of unconscionability has been established against the first respondent (the beneficiary), that damages would not be adequate remedy and the balance of convenience favours the grant of an injunction, the appellant would be entitled to the injunction sought.

B **[51]** It was for all the reasons aforesaid that we allowed the appellant's appeal with costs of RM10,000 and set aside the decision of the High Court. The deposit was ordered to be refunded to the appellant.

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